MARATHON OIL CO.

IBLA 88-676 Decided April 12, 1989

Appeal from a decision of the Director, Minerals Management Service, approved by the Assistant Secretary for Land and Minerals Management, assessing additional royalties on gas disposed of from various Federal leases.

Appeal dismissed.

1. Administrative Authority: Generally--Administrative Procedure: Administrative Review--Delegation of Authority--Rules of Practice: Appeals: Generally--Secretary of the Interior

   Where a decision of the Director, Minerals Management Service, is approved by an Assistant Secretary, the decision is final for the Department and the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision.

APPEARANCES: Patricia L. Brown, Esq., Washington, D.C., for appellant; Howard W. Chalker, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By decision signed by the Director, Minerals Management Service (MMS), on July 8, 1988, and thereafter approved by the Assistant Secretary for Land and Minerals Management on July 12, 1988, Marathon Oil Company (Marathon) was directed to pay additional royalties in the amount of $5,742,865.11, for its share of gas disposed under a rental gas agreement with Chevron Oil Company and Atlantic Richfield Company. On August 17, 1988, despite the express admonition in the decision that, since the decision had been approved by an Assistant Secretary, no further appeal would lie in the Department, Marathon filed a notice of appeal to this Board.

On September 23, 1988, counsel for MMS filed a motion to dismiss the subject appeal, arguing that, since the Assistant Secretary had approved the decision the decision was final for the Department and there was no further appeal within the Department, citing, inter alia, Blue Star, Inc., 41 IBLA 333 (1979). On September 30, 1988, Marathon requested an opportunity to brief the applicability of Blue Star prior to a ruling on the motion to

dismiss. By order of October 28, 1988, this Board, while noting that "as an initial matter, we would be inclined to grant the motion to dismiss for the reasons asserted by MMS," nevertheless granted Marathon's request that it be afforded an opportunity to brief the question of the Board's jurisdiction to entertain this appeal. Marathon subsequently submitted a substantial brief on this question and MMS has responded thereto. The question of the Board's jurisdiction is, thus, now ripe for review. For reasons which we will delineate, we hereby grant MMS' motion and dismiss the instant appeal for want of jurisdiction.

[1] We note as an initial matter that the authority of the Board of Land Appeals to review any matter is essentially the result of two separate regulations. First, 43 CFR 4.1(b)(3) is the grant of broad subject matter jurisdiction. It provides, in essence, full authority for the Board to decide finally for the Department matters relating to the use and disposition of the public lands and their resources, the use and disposition of the mineral resources of acquired lands and submerged lands of the Outer Continental Shelf, and the conduct of surface coal mining under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1201 (1982). Pursuant thereto, the Board has noted that, "In matters of adjudication properly before this Board its authority is coextensive with that of the Secretary." Exxon Company, U.S.A., 15 IBLA 345, 353 (1974).

But, the mere fact that a decision is within the general public lands and minerals subject matter jurisdiction of the Board does not establish that such a decision is subject to review by the Board. Once a decision can be said to be within the subject matter jurisdiction of IBLA, it is still necessary to establish that the prospective appellant has a right to appeal the decision to the Board. Resolution of this question is, itself, determined by reference either to 43 CFR 4.410 or 30 CFR 290.7. 1/

These regulations provide a general grant of a right of appeal from decisions of officers of the Bureau of Land Management (BLM) and MMS, respectively. Certain express limitations, however, are noted. Thus, decisions of BLM officials on land classification under 43 CFR Part 2400 are expressly not subject to appeal. See 43 CFR 4.410(a)(1). Another pro-vision, 43 CFR 4.410(a)(3), excepts from the right of appeal decisions of officers of BLM "[w]here a decision has been approved by the Secretary."

In Blue Star, Inc., supra, the Board had occasion to examine the scope of this limitation. The precise question examined therein was whether a decision of the Assistant Secretary for Indian Affairs was within the ambit

1/ While different regulations are applicable with respect to SMCRA, 30 U.S.C. | 1201 (1982) (see 43 CFR 4.1150, 4.1161, 4.1181, 4.1205, 4.1267, 4.1270, 4.1280, and 4.1290), the principle is the same. An individual must show not only that the decision being appealed is within the general subject matter jurisdiction of the Board, but he or she must also show that there is a separate grant of the right to appeal.

of the exception to the Board's jurisdiction. In holding that it was, the Board explored the theoretical basis for this regulatory exception:

> [T]he authority which has been delegated to the Office of Hearings and Appeals and to its Director, for the purpose of its specific functions, is the equivalent of that delegated to each of the several Assistant Secretaries, i.e., "all of the authority of the Secretary." Accordingly, each has the power to act with finality on matters within his or her own province. It follows that it was not contemplated that one officer who commands all of the authority of the Secretary should employ that authority to invade the province of another such officer who is not under his direct supervision. Thus, where an Assistant Secretary has made a decision or, prior to the filing of an appeal, has approved a decision made by a subordinate, that decision may not be reviewed in the Office of Hearings and Appeals since the full authority of the Secretary would have been exercised.

Id. at 335-36.

Admittedly, 43 CFR 4.410 is directed to appeals from decisions of officers of BLM, not MMS. But 30 CFR 290.7, which provides the general right of appeal from decisions of the Director, MMS, expressly makes those appeals subject to the procedures set forth at 43 CFR Part 4. Thus, the regulatory limitations on the right of appeal set forth at 43 CFR 4.410 are equally applicable to decisions issued by the Director, MMS.

Despite the foregoing, appellant argues strenuously that it has a right to appeal to this Board which is being improperly abrogated in this and other cases. Thus, Marathon argues that the procedures followed by MMS in the instant case, and with respect to other royalty matters generally, evinces a pattern of "circumvention" of the Board, violative of the Department's regulations and the requirements of due process. See Marathon's Opposition to Motion to Dismiss (Opposition) at 3.

Indeed, Marathon notes that MMS and Cook Inlet Region, Inc. (CIRI), entered into a memorandum of understanding (MOU) in 1983 which expressly provided that any findings, assessments, or determinations made as a result of a full audit and which adversely impacted upon CIRI's interests would be "approved by the Director of MMS to the supervising secretarial official with the recommendation they be approved as the final position of the Secretary so that suit may be brought in the federal district court without further administrative appeals." See Opposition, Exh. E. Marathon suggests that, to the extent this MOU represents a formal abrogation of its right of appeal, 2/ it violates the notice and comment provisions of the Administrative Procedures Act, 5 U.S.C. | 553 (1982). See Opposition at 15-16.

---

2/ Since a decision of the Director, MMS, can be adverse both to CIRI and Marathon, as, in fact, the instant decision apparently was, implementation of the MOU necessarily deprives Marathon of any further appellate review within the Department.

Marathon also suggests that the procedures utilized herein violate the provisions of section 102(a)(5) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. | 1701(a)(5) (1982) (Opposition at 3-4), as well as assurances made to Congress as to the availability of administrative review of royalty determinations (Opposition at 6-7). Appellant additionally argues that it has a contractual right to appellate review based on provisions in its leases (Opposition at 14-15).

None of the foregoing arguments, however, comes to grips with the essential question as to the effect of the Assistant Secretary's approval in the instant case. Clearly, under the plain meaning of the regulations as explicated by Blue Star, one consequence of Assistant Secretarial approval was to deprive this Board of jurisdiction over the matter involved. Not only is the subject matter of the decision beyond the Board's jurisdiction, so, too, is any inquiry as to the motives of the Assistant Secretary in approving the decision of the Director, MMS, or the procedures utilized in obtaining his approval. If appellant seeks to vindicate its right to appeal in such cases, it must look to a forum in which jurisdiction resides. So far as this Board is concerned, at the point in time in which the Assistant Secretary subscribed his assent to the decision, the decision and all subsidiary matters relating thereto passed beyond the Board's jurisdiction. The Board has no choice but to dismiss the instant appeal. 3/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the instant appeal is dismissed for lack of jurisdiction.

James L. Burski
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

3/ On Apr. 11, 1989, while this decision was being prepared for issuance, the Board received a motion from appellant seeking a stay in these proceedings pending a final determination of its due process claims in a suit presently before the United States Claims Court, styled Marathon Oil Co. v. United States, No. 457-88-L (Aug. 4, 1988). We have considered appellant's motion but, for the reasons explained in the text, we have concluded that no useful purpose would be served by maintaining the appeal before the Board since it lacks jurisdiction to review the due process claims being litigated. Accordingly, the motion to stay is denied.